The Owners of the cargo lately laden on board the ship or vessel MV 'Viva Ocean' v The Owners or demise charterers of the ship or vessel MV 'Viva Ocean'

HIGH COURT (TAWAU) — ADMIRALTY IN REM NO AA T (27) 01 OF 1995
RICHARD MALANJUM JCA
30 JANUARY 2004

Shipping and Navigation — Carriage of goods — Bill of lading — Limitation of liability — Whether limitation of liability in Merchant Shipping (Implementation of Conventions Relating to Carriage of Good by Sea and to Liability of Shipowners and Others) Regulations 1960 applied — Whether vessel British, Sarawak or foreign ship — Whether vessel belonged to Convention-based country — Whether shipowner entitled to rely on tonnage limitation — Merchant Shipping (Implementation of Conventions Relating to Carriage of Good by Sea and to Liability of Shipowners and Others) Regulations 1960 reg 11

Shipping and Navigation — Contract of carriage — Bill of lading — Parties to contract — Bill of lading not issued by owner of vessel — Whether owner of vessel liable for damage to cargo

Shipping and Navigation — Carriage of goods — Damage and/or loss to goods — Unseaworthiness — Whether shipowner proved on balance of probabilities how or why there was ingress of water into cargo holds — Whether vessel seaworthy before and during voyage

Words and Phrases — 'foreign ship' — Meaning of — Merchant Shipping (Implementation of Conventions Relating to Carriage of Good by Sea and to Liability of Shipowners and Others) Regulations 1960 reg 11

The defendants were the owner of the vessel MV Viva Ocean ('the vessel'). A bill of lading ('bill of lading') was issued by Dooyang Line Co Ltd to the plaintiffs to ship 5,500 metric tonnes of ammonium sulphate ('the cargo') on board the vessel from Ulsan Port, South Korea to Tawau Port, Malaysia. The plaintiffs were the owner of the cargo. When the vessel arrived at Tawau Port, the plaintiffs' agent discovered that the cargo was badly damaged. Surveyors were appointed by the plaintiffs to inspect the damaged cargo and to find out the cause. The surveyors concluded that the wettage was by seawater. This was the plaintiffs' claims for damages for: (a) loss of value of the damaged cargo; (b) handling and weighment charges and rental of warehouse; (c) survey fees and loss of profits. The plaintiffs alleged that the defendants breached the duty to take reasonable care of the cargo and to deliver the same in good order and condition as when it was shipped and that the defendants, in breach of the contract of carriage, failed to ensure at all times that the vessel was seaworthy. The defendants denied liability for the wettage of the cargo asserting that due diligence was exercised to make the vessel seaworthy before, at the beginning and during the voyage and that the wettage was attributed to perils, dangers and accidents of the sea, act of God and other causes without actual fault or privy of the defendants or without the fault or neglect of their agents or servants. The defendants also asserted that even if they were liable for the damage to the cargo, such liability would be limited in view of the terms in the bill of lading. The

defendants also relied on reg 11 of the Merchant Shipping (Implementation of Conventions Relating to Carriage of Good by Sea and to Liability of Shipowners and Others) Regulations 1960 ('the Regulations') to limit their liability.

Held, allowing the plaintiffs' claim:

(1) Clause 15 of the bill of lading stipulated if the vessel was not owned by Dooyong Line Co Ltd, the bill of lading shall take effect only as a contract with the owner as principal made through the agency or line, which acted as agent only and shall be under no personal liability whatsoever. Based on the said cl 15, there was no basis for the defendants to say that they were not privy to the contract as reflected in the bill of lading. Although the defendants admitted that the vessel was on time charter, there was no evidence adduced that such fact was known by the plaintiff. Therefore, there was no necessity to take as a factor the nature of charterparty in the instant case. Accordingly, on the balance of probabilities, a contract of carriage by sea existed with the defendants being privy to it. It followed that the damage to the cargo would expose the defendants to liability subject to proof of the claim (see paras 16, 19, 20 and 23).

(2) The defendants relied on the testimonies of witnesses who claimed that they were told by the Master and the Chief Officer of the vessel that rough weather had caused the tarpaulin to tear during the journey thereby exposing the pontoon covers through which the seawater then flowed into the cargo holds. The defendants did not call the Master or the Chief Officer of the vessel to testify and no credible reason was given for their absence. The testimonies of the defendants' witnesses were plainly hearsay and thus inadmissible (see paras 26 and 28).

(3) Accordingly, the defendants had failed to prove, on the balance of probabilities, their assertion as to how or why there was ingress of water into the cargo holds. The testimonies of the plaintiffs' witnesses in respect of their findings of cracks, severe corrosion and wastage in the cargo holds stood unrebutted. On the balance of probabilities, the vessel was not seaworthy before and during the voyage (see paras 35 and 49).

(4) Based on the condition of the vessel before and during the voyage, the failure by the defendants to exercise due diligence and the absence of admissible evidence in support of the assertions of peril at sea or act of God, the defendants were not entitled to rely on the exceptions under the bill of lading and the relevant provisions in the Hague Rules (see paras 51, 53 and 59).

(5) In view of the findings on the fault and privity issues, any reliance on the Regulations would fail *in limine*. Even if the court were wrong in this regard, reg 11 applied if the vessel was a British, Sarawak or foreign ship and if the vessel belonged to a Convention-based country. The term 'foreign ship', though undefined, meant a vessel, a ship qualified to be registered as a British ship notwithstanding that it had yet been registered and included any Sarawak ship. In the instant case, there was no

admissible evidence to indicate that the vessel was registered in Panama but even if it were, it was not established that the vessel was qualified to be registered as a British ship. Further, it was not disputed that Panama was not a Convention-member country. As such, the defendant had failed to establish on the balance of probabilities that they were entitled to rely on the tonnage limitation under the Regulations as a defence against the plaintiffs' claim (see paras 66, 67 and 68).

(6) There was no merit in the defendants' submission that there was no depreciation in the value of the cargo and that the plaintiffs should not have sold the cargo at a discounted price. The cargo had a higher content of sodium chloride due to contact with seawater and no one would pay for an item which was not in its original and normal state. In respect of the claim for the expenses incurred for stevedoring, handling charges, weighment charges and rental of warehouse, such expenses were not allowable as they would have to be incurred by the plaintiffs in any event. The plaintiffs' claim for survey fees was allowable because there was a need to engage surveyors after the plaintiffs discovered that the cargo was damaged. As for the plaintiffs' claim for loss of profit, the provisions in the bill of lading did not exempt the defendants from being liable to pay for the alleged loss of profits. In the instant case, the plaintiffs had succeeded in proving that the loss of profit was the natural consequence of a breach of contract by the defendants and there was no requirement that the defendants had to have prior knowledge of the resale of the cargo (see paras 74, 79, 80 and 84).

[Bahasa Malaysia summary

Defendan adalah pemilik kapal MV Viva Ocean ('kapal itu'). Satu bil muatan ('bil muatan') dikeluarkan oleh Dooyang Line Co Ltd kepada plaintif untuk mengangkut 5,500 ton metrik ammonium sulfat ('kargo itu') atas kapal itu dari Pelabuhan Ulsan, Korea Selatan ke Pelabuhan Tawau, Malaysia. Plaintif adalah pemilik kargo itu. Apabila kapal itu tiba di Pelabuhan Tawau, agen plaintif mendapati kargo telah mengalami kerosakan. Pemeriksa telah dilantik oleh plaintif untuk menyiasat kerosakan kargo dan sebabnya. Pemeriksa membuat keputusan air laut menyebabkan pembasahan kargo itu. Ini adalah tuntutan ganti rugi plaintif untuk: (a) kerugian nilai kargo rosak; (b) pengendalian dan bayaran keberatan dan sewa gudang; (c) bayaran pemeriksaan dan kehilangan keuntungan. Plaintif menghujah bahawa defendan telah melanggar kewajipan untuk menjaga kargo dan menghantarnya dalam keadaan baik seperti sediakala semasa penghantaran dan defendan melanggar kontrak pengangkutan sebab gagal untuk memastikan bahawa kapal itu layak belayar. Defendan menafikan liabiliti untuk pembasahan kargo itu, serta menegaskan usaha yang sewajarnya dilakukan supaya kapal layak belayar, sebelum, pada permulaan dan semasa pelayaran dan pembasahan berpunca daripada bahaya dan kemalangan di laut, bencana alam dan sebab yang lain tanpa kesalahan atau pengetahuan defendan atau tanpa kesalahan atau kecuaian agen atau pekerja defendan-defendan. Defendan mengutarakan bahawa jikapun mereka

bertanggungjawab untuk kerosakan kargo, liabiliti sedemikian terhad kepada terma bil muatan. Defendan juga bergantung pada peraturan 11 Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 ('Peraturan-Peraturan itu') untuk menghadkan liabiliti mereka.

Diputuskan, membenarkan tuntutan plaintif:

(1) Klausa 15 bil muatan menetapkan jika kapal tidak dimiliki oleh Dooyang Line Co Ltd, bil muatan akan berkuatkuasa sebagai kontrak dengan pemilik sebagai prinsipal dibuat melalui agensi atau kapal, yang bertindak sebagai agen sahaja dan tidak di bawah liabiliti perseorangan. Berdasarkan kl 15 tiada alasan untuk defendan mengatakan bahawa mereka tidak mempunyai pengetahuan yang khusus kontrak seperti didalam bil muatan. Walaupun defendan mengakui kapal itu atas piagam masa, tiada keterangan dikemukakan untuk menunjukkan bahawa plaintif mengetahui fakta sedemikian. Oleh itu, tidak ada keperluan untuk mengambilkira sebagai faktor sifat carter parti dalam kes ini. Oleh itu, di atas imbangan kebarangkalian, kontrak pengangkutan laut wujud dengan defendan yang mempunyai pengetahuan yang khusus. Dengan itu, kerosakan kepada kargo akan mendedahkan defendan kepada liability tertakluk kepada bukti tuntutan (lihat perenggan 16, 19, 20 dan 23).

(2) Defendan bergantung atas testimoni saksi yang berkata mereka diberitahu oleh Nakhoda kapal dan Ketua Pegawai Kapal bahawa cuaca buruk telah menyebabkan kain tarpaulin koyak semasa perjalanan dengan itu mendedahkan penutup pontoon yang menyebabkan air laut mengalir ke dalam tempat simpanan kargo. Defendan tidak memanggil Nakhoda kapal atau Ketua Pegawai Kapal untuk menjadi saksi dan tiada alasan yang munasabah diberikan untuk ketiadaan mereka. Testimoni saksi defendan adalah keterangan dengar cakap dan oleh itu tidak boleh diterima (lihat perenggan 26 dan 28).

(3) Sewajarnya, defendan gagal untuk membukti, atas imbangan kebarangkalian penegasan mereka bagaimana atau mengapa terdapat kemasukan air ke tempat simpan kargo. Testimoni-testimoni saksi plaintif mengenai rekahan, pengakisan yang teruk dan pembaziran di tempat simpan kargo tidak disangkal. Pada imbangan kebarangkalian, kapal itu tidak layak layar sebelum dan semasa pelayaran (lihat perenggan 35 dan 49).

(4) Berdasarkan keadaan kapal sebelum dan semasa pelayaran kegagalan oleh defendan untuk menggunakan usaha yang sewajarnya dan ketiadaan keterangan boleh-terima untuk menyokong kenyataan bahaya di laut atau bencana alam, defendan-defendan tidak berhak bergantung atas pengecualian di bawah bil muatan dan peruntukan yang relevan didalam Peraturan Hague (lihat perenggan 51, 53 dan 59).

(5) Berdasarkan pada keputusan atas kesalahan dan isu-isu priviti, sebarang pergantungan atas Peraturan akan gagal. Walaupun jika mahkamah salah dalam hal ini, peraturan 11 dipakai jika kapal itu adalah British,

Sarawak atau kapal asing dan jika kapal itu dipunyai oleh sebuah negara berasaskan-Konvensyen. Istilah 'foreign ship', walau tidak ditafsirkan, bermaksud sebuah kapal yang layak didaftarkan sebagai kapal British tanpa mengira bahawa ia masih belum didaftarkan dan termasuk sebarang kapal Sarawak. Dalam kes ini, tiada keterangan boleh-terima untuk menunjukkan kapal itu didaftarkan di Panama tetapi walaupun jika dapat ditunjukkan ia tidak dibuktikan bahawa kapal tersebut layak untuk didaftarkan sebagai sebuah kapal British. Oleh itu, defendan gagal untuk membuktikan atas imbangan kebarangkalian bahawa mereka berhak bergantung atas had ton di bawah Peraturan sebagai pembelaan terhadap tuntutan plaintif (lihat perenggan 66, 67 dan 68).

(6) Tiada merit dalam penghujahan defendan bahawa tiada susutan dalam nilai kargo dan plaintif tidak patut menjual kargo itu dengan potongan harga. Kargo itu mempunyai kandungan sodium klorida yang lebih tinggi disebabkan oleh pendedahan air laut dan tidak sesiapa pun mahu membayar untuk sesuatu benda yang bukan di dalam keadaan asal atau keadaan biasa. Dalam hal ini tuntutan untuk perbelajaan yang dialami untuk pemunggahan, bayaran pengendalian, bayaran keberatan, sewa gudang, perbelanjaan sedemikian tidak dibenarkan kerana sememangnya ia akan dialami oleh plaintif dalam apa keadaan pun. Tuntutan plaintif untuk bayaran pemeriksaan dibenarkan kerana ada keperluan untuk menggunakan pemeriksa selepas plaintif mendapati bahawa kargo itu mengalami kerosakan. Mengenai tuntutan plaintif untuk kehilangan keuntungan, peruntukan di dalam bil muatan tidak mengecualikan defendan daripada membayar untuk kehilangan keuntungan. Dalam kes ini, plaintif berjaya membuktikan kehilangan keuntungan adalah akibat biasa pelanggaran kontrak oleh defendan dan tidak ada keperluan bahawa defendan harus mempunyai pengetahuan penjualan semula kargo (lihat perenggan 74, 79, 80 dan 84).]

Notes

For cases on bill of lading (contract of carriage), see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1424-1425, 1427-1432.

For cases on bill of lading (carriage of goods), see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1204-1333.

For cases on damage and/or loss to goods, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue), paras 1367-1369, 1372-1377.

For bill of lading, see 15 *Halsbury's Laws of Malaysia*, para [260.0092].

Cases referred

Anglia Television v Reed [1972] 1 QB 60 (refd)

'Arpad', The [1934] 49 Lloyd's Rep 313 (refd)

Associated Metals & Minerals Corporation v The Ship 'Evie W', Aris Steamship Co Inc and Worldwide Carriers Ltd (the 'Evie W') [1978] 2 Lloyd's Rep 216 (refd)

Atlantic Shipping and Trading Company Ltd v Louis Dreyfus & Company [1922] 2 AC 250 (refd)

A *Berkshire, The* [1974] 1 Lloyd's Rep 185 (refd)
Baumvoll Manufactur von Scheibler v Gilchrest & Co and another [1892] 1 QB 253 (refd)
Baumwoll Manufactur von Carl Scheibler, The v Christopher Furness [1893] AC 8 (refd)
Foreswood Timber Sdn Bhd v Rajang Line Sdn Bhd & 4 Ors [1999] 3 AMR
B 3029; [1999] MLJU LEXIS 675 (refd)
Gilroy, Sons & Co v WR Price & Co [1893] AC 56 (refd)
Heskell v Continental Express Ltd [1950] 1 All ER 1033 (refd)
Ingram & Royle Limited v Services Maritimes du Treport [1913] 1 KB 538 (refd)
Lady Gwendolen, The [1965] 2 All ER 283 (refd)
Lee Heng & Co v C Melchers & Co [1963] MLJ 47 (refd)
C *Lloyds & Scottish Finance Ltd v Modern Cars and Caravan (Kingston) Ltd* [1966] 1 QB 764 (refd)
'Makedonia, The' [1962] 1 Lloyd's Rep 316 (refd)
Marion, The [1984] 2 Lloyd's Rep 1 (refd)
Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng' [1998] 6 MLJ 468 (refd)
D *'Rewia', The* [1991] 2 Lloyd's Rep 325 (refd)
'Saudi Crown', The [1986] 1 Lloyd's Rep 261 (refd)
Sim Tiew Bee v Public Prosecutor [1973] 2 MLJ 200 (refd)
Steel v The State Line Steamship Co [1877] 3 AC 72 (refd)
Sunrise Maritime Inc v Uvisco Ltd ('The Hector') [1998] 2 Lloyd's Rep 287 (refd)
E *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39 (refd)
'Venezuela', The [1980] 1 Lloyd's Rep 393 (refd)

Legislation referred to

Civil Law Act 1956 s 11
F Evidence Act 1950 ss 106, 114(g)
Merchant Shipping Act 1958 [Eng]
Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 regs 9, (1), (3), 11, cl (d), 11(1), Pt III
Merchant Shipping Ordinance 1952

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Francis Wong (Peter Lo & Co) for the plaintiffs.
Saiful Azian bin Mokhtar (Jayasuriya Kah & Co) for the defendants.

Richard Malanjum J:

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INTRODUCTION

[1] In this action the plaintiffs are claiming for the following relief, namely:

(1) Damages, inter alia,

Loss of value of damaged goods		US$700,000.00
Less:	Salvage value of damaged goods	RM121,400.00
	Handling and transportation charges	RM154,117.94

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Rental of warehouse	RM 28,880.00
Weightment charges	RM 2,580.00
Survey Fees	RM 3,130.00
Loss of profit	RM192,500.00

(2) Discretionary interest thereon at the rate of 8%pa pursuant to s 11 of the Civil Law Act 1956, from the date of the writ of summons in rem to the date of judgment;

(3) Statutory interest at the rate of 8%pa from the date of judgment to the date of actual full payment;

(4) Costs; and

(5) Such other and further reliefs as may be just.

[2] The claim is related to the wettage of goods, namely, 5,500 metric tonnes of fertilizer (ammonium sulphate) in bulk ('the cargo'), on shipment from the Port of Ulsan, South Korea to Tawau, Malaysia on board a ship, MV Viva Ocean ('the vessel'), owned by the defendants.

[3] It is the assertion by the plaintiffs that they were the holder of the Bill of Lading No. DYLLVOUT3001 dated 30 November 1995 ('the Bill of Lading') issued by Dooyang Line Co Ltd and that they were the owner and receiver of the cargo. And that pursuant to or by virtue of the contract of carriage contained in or evidenced by the Bill of Lading and/or as bailee and/or carriers for reward the defendants were under a duty to take reasonable care of the cargo and to deliver it in good order and condition as when it was shipped. It is alleged that the defendants breached such duty. And it is further alleged that the defendants, in breach of the contract of carriage, failed to ensure at all times that the vessel was seaworthy and/or to make her holds fit and/or safe for the reception and/or carriage and/or preservation of the cargo.

[4] The defendants are denying liability for the wettage of the cargo asserting that due diligence was exercised to make the vessel seaworthy before, at the beginning and during the voyage. The wettage was attributed to perils, dangers and accidents of the sea, Act of God and other causes without actual fault or privy of the defendants or without the fault or neglect of their agents or servants.

[5] And it is also asserted that even if the defendants were liable for the damage to the cargo, such liability would be limited in view of the terms in the Bill of Lading. The defendants also relied on the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and/or tonnage limitation.

THE AGREED AND UNDISPUTED FACTS

[6] At the commencement of the hearing the parties agreed to the following facts:

1 That the Defendant was the owner of the vessel MV Viva Ocean at the material time.

2 That a Bill of Lading No: DYLLVOUT03001 dated 30 November 1995 was issued by Dooyang Line Company Ltd to ship 5,500 MT of Ammonium Sulphate ('the said Goods') on board the vessel MV Viva Ocean from Ulsan Port, South Korea to Tawau Port, Malaysia.

3 That Agri-Sabah Fertilizer Sdn Bhd as owner of the said Goods took delivery of the goods at Tawau Port.

[7] And the following facts are not in dispute, namely:

(i) MV Viva Ocean left Ulsan Port, South Korea with the cargo on 1December 1995;

(ii) The vessel arrived at Tawau Port, Sabah on 11 December 1995 and subsequently berthed alongside the port on 17 December 1995 and commenced to discharge the cargo thereafter;

(iii) On 18 December 1995 the plaintiffs' agent discovered that the cargo was badly damaged. Surveyors were appointed to inspect the damaged cargo and to find out the cause.

(iv) From the analysis by PW1 Mr Kong Khim Chong as per his reports tendered as exhs P1 and P2 it was concluded that the wettage was by seawater; and

(v) While the cargo was discharged, portable pump was used to pump the water out of the cargo holds and finally on 25 December 1995 the cargo was completely discharged from the vessel.

THE ISSUES

[8] Now, the primary task of this court is to determine whether overall the plaintiffs have proved their case on the balance of probabilities against the defendants in respect of their claim after having considered the defences raised.

[9] In his final submissions learned counsel for the plaintiffs submitted that the main issue should be whether the ingress of seawater into the cargo holds of the vessel was due to the said vessel being un-seaworthy and/or un-cargoworthy or that it was due to perils of sea and such other defences raised and as alleged by the defendants.

[10] And it was further contended by learned counsel for the plaintiffs that in view of the agreed and undisputed facts in this case the plaintiffs should only be required to prove the damages suffered as a result of the wettage of the cargo on arrival at its destination. Such argument was premised upon the maxim res ipsa loquitur in view of the fact that when the cargo was shipped on board the vessel it was in good order and condition as evidenced by the issuance of 'Clean on Board' Bill of Lading. Yet on arrival at its destination it was wet damaged. Hence, it was averred, relying on s 106 of the Evidence Act 1950 ('the Act'), that the burden should be upon the defendants to prove

how the cargo was wet damaged and that they had exercised due diligence thereby entitling them to rely on the exemption or exception under the Bill of Lading and/or the Convention and/or tonnage limitation.

[11] It was also submitted for the plaintiffs that where the evidence showed that the vessel was not seaworthy or un-cargoworthy at the material times the defendants should not be entitled to rely on the Hague Rules, art 4(1) or on the tonnage limitation. The following cases were cited in support of the preposition:

a *Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng'* [1998] 6 MLJ 468;

b *Ingram & Royle Limited v Services Maritimes du Treport* [1913] 1 KB 538;

c *Atlantic Shipping and Trading Company Ltd v Louis Dreyfus & Company* [1922] 2 AC 250;

d *Steel v The State Line Steamship Co* [1877] 3 AC 72; and

e *Gilroy, Sons & Co v WR Price & Co* [1893] AC 56.

[12] Accordingly, leaving aside the applicability of the maxim *res ipsa loquitur*, it would be incumbent upon the plaintiffs to show that indeed the vessel was not seaworthy and/or not cargoworthy at the material times.

[13] However before I proceed to consider that aspect of the evidence I should first deal with the initial thrust in the submissions by learned counsel for the defendants. And that is based on the contention that the terms in the Bill of Lading do not make the defendants a privy to the contract.

[14] Such stand taken by the defendants is understandable. At the commencement of the hearing despite being informed of the trial date much earlier, an application was made for an adjournment. Reasons were given including the requirement for time to locate their witnesses and to prepare for the trial. I refused the application. The hearing proceeded as scheduled and when it was for the defence to adduce evidence neither the Master nor any crew member of the vessel was called as a witness.

Defendants Privy To The Contract?

The Contentions

[15] It is a question on privity of contract. It was contended that based on the Bill of Lading the defendants could not be made a party to the contract of carriage for the following reasons:

(i) that there was nothing in the Bill of Lading to indicate that it was on time charter;

(ii) that there was in printed clause wherein Dooyang Line was described as 'shipowner' and thus superceding cl 15 in the Bill of Lading;

(iii) that there was nothing in the Bill of Lading to indicate that there was another party as a carrier; and

(iv) that although the general assumption is that an owner of a vessel is liable for any loss or damage occurring to cargo carried in its vessel, in the final analysis it is the construction of the terms in a bill of lading that is crucial to identify and determine the contracted carrier. The cases of *Sunrise Maritime Inc v Uvisco Ltd ('The Hector')* [1998] 2 Lloyd's Rep 287 and *The 'Venezuela'* [1980] 1 Lloyd's Rep 393 were cited in support of the contention.

[16] In response to the foregoing submission the plaintiffs argued that cl 15 of the Bill of Lading made it clear that the contracting party should be the owner of the vessel. That clause reads:

> 15 IDENTITY OF CARRIER: If the ship is not owned by or chartered by demise to Dooyang Line Company Ltd or the line or company by or on behalf of whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary), this Bill of Lading shall take effect only as a contract with the Owner or demise Charterer as the case may be as principal made through the agency or said carrier or line, who acts as agent only and shall be under no personal liability whatsoever in respect thereof.

[17] It was further contended that in this case there was no evidence on the nature of the relationship between Dooyang Line Co Ltd and the shipowner. And at the same time it was not in dispute that the defendants were the owner of the vessel at the material time employing the Master and crew to operate and manage it. Accordingly it was surmised that the defendants were conducting the business via an agent, Dooyang Line Co Ltd and hence contractually liable for any breach.

[18] The plaintiffs also relied on the following to support their assertion that the defendants were the contracting party under the Bill of Lading, *inter alia*:

(i) that there was no evidence that the vessel was on charterparty;

(ii) that even if there was a charterparty, it was a non-demised charterparty thereby rendering the owner liable;

(iii) that the witnesses for the plaintiffs were not cross-examined on the point;

(iv) that the defendants submitted to the jurisdiction of the court; and

(v) that the action of the plaintiffs was based both on contract and tort.

The Finding On Privity

[19] Having considered the evidence adduced and the respective contentions of the parties, I am inclined to accept the argument advanced by the plaintiffs in that cl 15 of the Bill of Lading should be construed accordingly to determine the issue. And having undertaken such exercise I have no hesitation to find that there is no basis for the defendants to say that they were not privy to

the contract as reflected in the Bill of Lading. It follows then that the wet-damage to the cargo would expose the defendants to liability subject to proof of the claim.

[20] In fact the defendants adduced no evidence that the vessel was under a charterparty. However it was admitted in the final submissions of their learned counsel that it was on time charter. In any event there was no evidence adduced that such fact was known by the plaintiffs. Accordingly there is therefore no necessity to take as a factor the nature of the charterparty in this case. (See *The Berkshire* [1974] 1 Lloyd's Rep 185,*Associated Metals & Minerals Corporation v The Ship 'Evie W', Aris Steamship Co Inc and Worldwide Carriers Ltd (the 'Evie W')* [1978] 2 Lloyd's Rep 216; *Halsbury's Laws of England* (4th Ed) Vol 43 para 528).

[21] I am also inclined to agree with the submission of learned counsel for the plaintiffs that even the misrepresentation in describing Dooyang Line as the 'shipowner' in the Bill of Lading would expose the defendants to liability. (See *The 'Saudi Crown'* [1986] 1 Lloyd's Rep 261).

[22] And there was also no denial that the Master and crew were servants of the owner of the vessel and it was not shown that the defendants parted possession of the vessel at the material times. As such being a non-demised charterparty the defendants herein would still be held liable for the claim if proved. (See *The 'Rewia'* [1991] 2 Lloyd's Rep 325; *Baumvoll Manufactur von Scheibler v Gilchrest & Co and another* [1892] 1 QB 253 affirmed in *The Baumwoll Manufactur von Carl Scheibler v Christopher Furness* [1893] AC 8 wherein Lord Herschell LC said this at pp 17–18:

> Not a single authority has been cited in which the owner of a vessel has ever been held liable on a bill of lading or as for a tort in any case in which the master of the vessel, or those who were guilty of the negligence, have not been properly described as the servants of the owner. No doubt a vessel may be chartered, and the charterer may have, during its continuance, full power to deal with the vessel, to determine her voyage, and to direct the course that she shall take, where, nevertheless, the master and crew remain truly the servants of the owner. In that case I apprehend it is perfectly clear that by reason of the relationship still subsisting, the owner becomes bound by such a contract as a bill of lading, and by all the contracts which a master can ordinarily make, and which persons therefore have a right to presume he is authorized to make, binding the owner.

[23] Accordingly I am satisfied on the balance of probabilities that a contract of carriage by sea existed with the defendants being privy to it as well as carriers for reward at all material times.

DID THE DEFENDANTS EXERCISE DUE DILIGENCE BEFORE AND AT THE COMMENCEMENT OF THE VOYAGE OF THE VESSEL?

Was the damage to the cargo due to perils of sea or act of God without any fault of the defendants or their agent or servant?

[24] As stated earlier it was submitted by learned counsel for the plaintiffs that upon proof of the damage to the cargo on delivery, the burden should

shift to the defendants to prove that due diligence was exercised to prevent the damage. With respect, I am inclined to agree with such contention as representing the correct legal preposition.

[25] In the present case there was hardly any dispute that the cargo was wet-damaged on arrival at the port of destination, namely, Tawau, Sabah, Malaysia.

[26] The defendants gave their version on the cause of the damage to the cargo. The blame was focused on the torn tarpaulin due to rough weather during the journey thereby exposing the pontoon covers through which the seawater then found itself into the cargo holds. Unfortunately such assertion did not come from the Master or any of the crew member of the vessel at the material times. Reliance was placed on the testimonies of the witnesses who claimed to have been told by the Master and/or the Chief Officer of the vessel during their survey inspections upon being engaged by the P & I Club of the vessel.

[27] It was therefore not surprising to hear learned counsel for the plaintiffs submitting that such assertion was based on conjectures as any evidence on the matter would have been plainly hearsay and inadmissible.

[28] I have no hesitation to agree with such submission since neither the Master nor any member of the crew of the vessel was called to testify and no credible reason was given for their absence. This is therefore an appropriate case in which s 114(g) of the Act applies.

[29] I hold therefore that there was no direct evidence other than mere conjecture to support the version of the defendants as to the cause of ingress of seawater into the cargo holds of the vessel. None of witnesses called was on the voyage.

[30] For instance, DW1 — Mr Chow Din Ming, Joseph, testified that there was notice of readiness prior to the departure of the vessel and that it was fully equipped. And although he said that the vessel was regularly maintained with minor engineering works having been carried out, he had no knowledge of why the Master and the crew did not use the new tarpaulin sheets and the necessary hatch-securing equipment in the course of the voyage. That of course was based on the assumption that he was correct to say that there were new tarpaulin sheets on board the vessel. Anyway, such shortcomings did not prevent him from concluding that the ingress of seawater into the cargo holds must have been through the pontoon covers and hatch covers due to the torn tarpaulin sheets.

[31] The other witnesses DW3 Mr Liew Chee Vui and DW4 Mr Shia Sin Liat were surveyors from KASI (Malaysia) Sdn Bhd. Their company was engaged to do a survey on the damaged cargo. DW3 said that he boarded the vessel on 20 December 1995 and again on 21 December 1995 with DW4 to carry out inspections and to interview her Master and the Chief Officer. They were advised during the interviews on the reasons and manner of the ingress of seawater into the cargo holds of the vessel.

[32] With respect, I do not see why I should accept the testimonies of these two witnesses pertaining to the ingress of seawater when they are patently hearsay. Thus no weigh should be given to such evidence.

[33] No doubt it was also the evidence of DW3 that the hose test was carried out on the vessel which involved firstly the securing of the hatch covers as should have been done prior to departure and then directing a very high powered hose randomly at the numerous parts of the hatch covers, hatch coamings and weather decks to check if they were water-tight. And it was the evidence of DW3 that the result showed in the affirmative.

[34] But then again it would be difficult to accept the evidence of DW3 purely on the result of the test. No one came to say that the Master or the crew did exactly what was expected of them in securing the hatch covers. And assuming they did that it would only strengthen the assertion that the ingress must have been elsewhere. It would be quite unreasonable to depend solely on the presence of the torn tarpaulin sheets when the inspection took place and then to say that the pontoon covers and the hatch covers must have been the entry points. And the evidence of DW5 did nothing more but was merely an attempt to corroborate the evidence of DW3 and DW4. To begin with no amount of corroboration can make hearsay evidence admissible.

[35] Accordingly, for the above reasons I agree with the contention by learned counsel for the plaintiffs that the defendants failed to prove on the balance of probabilities their assertion as to how or why there was ingress of seawater into the cargo holds.

[36] In the circumstances of this case I am also of the view that as submitted it is quite justified for the plaintiffs to rely on the maxim res ipsa loquitur. (See *Foreswood Timber Sdn Bhd v Rajang Line Sdn Bhd & 4 Ors* [1999] 3 AMR 3029; [1999] MLJU LEXIS 675).

[37] The remaining question therefore is whether the ingress of seawater was due to the vessel being not seaworthy and/or not cargoworthy. If reliance on the maxim res ipsa loquitur is placed as contended by the plaintiffs, then even at this stage alone, and I think I should, find the defendants liable for failing to exercise due diligence in ensuring that the vessel was seaworthy and/or cargoworthy prior to and during the voyage.

[38] But leaving aside the maxim for the moment, I am of the opinion that before there can be an answer to the foregoing question it is necessary to determine why and/or how the ingress of water into the cargo holds. The determination of such issue has a bearing on whether the defendants can then rely on the exemptions and tonnage limitation as pleaded in defence.

[39] But with the defendants being found to have failed to discharge their burden of proof on their assertion of how and why there was ingress of seawater into the cargo holds, the version of the plaintiffs stands unchallenged.

[40] Anyway, for completeness it is the version of the plaintiffs that upon discovery of damage to the cargo they appointed a company to investigate,

inter alia, the cause. PW6 En Mohammad bin Israil of SGS Malaysia Sdn Bhd thus carried out an investigation into the cause. He prepared exh P61. In summary it was the evidence of PW6 that on 17 December 1995 he boarded the vessel to do a draft survey of the vessel. He found out that she had more cargo than as stated in the Bill of Lading. He received no explanation on the discrepancy from the Chief Officer of the vessel. He was also neither told of the vessel having encountered adverse weather during the voyage nor of the torn tarpaulin covering the pontoon covers. And on 19 December 1995 he boarded the vessel again. That was when he noticed water flowing from the grab used to discharge the cargo and that the cargo holds No. 1 and No. 2 were flooded. He took some photographs and these were included in his report. This witness also saw that a portable pump was used during the discharge of the cargo. And under cross-examination PW6 said that at the material time he saw continuous ingress of water into the holds. He then went on to say that by 25 December 1995 the cargo discharging was completed. However, he was not allowed by the Chief Officer of the vessel to enter the cargo holds on that day despite repeated requests. He was only allowed on 30 December 1995 when he saw that the vertical shell frames, tank side brackets, cargo steel battens, stringers, tank top adjacent to the shell platting as well as the shell platting were all severely corroded. He took pictures of them. He also noticed that there were several corroded shell frames detached from the shell platting, freshly made cement boxes in between the frames and an old cement box which was bluish in colour indicating that it was installed near to the ship side (port) in the way of the tank top. And finally this witness made his conclusion based on what he saw. But I do not propose to accept it wholesale.

[41] Meanwhile, it is unfortunate that the Chief Officer of the vessel was not called by the defendants to either rebut what was seen by PW6 or at least to give his account of the event. As such I am left with the uncontroverted version of what PW6 had seen when he went on board the vessel. In any event it is for this court to make its own finding or conclusion in relation to ingress of water based on, inter alia, the evidence adduced including that of PW6.

[42] The next witness called by the plaintiffs was PW7 Mr Choi Chook Seng. He boarded the vessel on 22 December 1995 to ascertain the cause, nature and extent of damage to the cargo. He prepared exh P63. His evidence basically corroborated the evidence of PW6. But in addition it was also his testimony that on opening the cargo holds he noticed that they were flooded with water. And he saw some of the crew using portable pumps to pump out the water from cargo hold No. 2. PW7 also said that he inspected the hatch covers for the cargo holds No. 1 and No. 2. He discovered that each was fitted with pontoons covers totalling 16 and 17 respectively. But between the pontoon covers there were gaps in the range of 10mm to 20mm which were not sealed. PW7 went on to say that the tarpaulin sheets used to cover the pontoon/hatch covers were of poor quality as he could tear them with his bare hands. And this witness also described what he saw in the cargo holds. He said that he saw extensive corrosion on the tank top with holes and he

saw scalings on the plattings resulting in them being thinned. This witness did not think the corrosion was due to the nature of the cargo of the vessel but more likely due to continuous corrosion process.

[43] It is to be noted that according to PW7 the Chief Officer of the vessel told him that only one single layer of tarpaulin sheet without netting was used to cover the pontoon/hatch covers. This is not consistent with what DW3 and DW4 claimed to have been told to them by the Chief Officer.

[44] Anyway, PW7 made his own conclusion on the probable sources of the ingress of seawater based on what he saw on board the vessel during the inspection. According to him there could be two probable ways, firstly, due to the torn and poor quality of the tarpaulin sheets whereby water then seeped through the gaps between the pontoon covers and then through the hatch covers and secondly, through the corroded holes of the double bottom tank top. But again I do not intend to simply accept the conclusion this witness has made without considering the evidence as a whole.

[45] The plaintiffs also called PW8 Capt Lee Fook Choon. His evidence was basically one of opinion based on his experience. It was the view of this witness that a gale with the force of 8 should have been within the capability of the vessel to withstand considering its size and the known condition of the seas in which it was expected to ply.

[46] It is of interest to note that on one hand the witnesses called by the defendants went on to relate substantially what were told to them by the Chief Officer of the vessel and relied on them while the surveyors, in particular PW6 and PW7, appointed by the plaintiffs described what they saw of the relevant parts of the vessel during their inspections.

[47] But for the reason stated earlier, I cannot accept the evidence adduced by the witnesses for the defendants as to how the seawater managed to flood the cargo holds. There was also not a shred of documentary evidence tendered as regards the condition of the sea during the voyage.

[48] Thus, in considering the issue I am basically left with only the testimonies of the witnesses for the plaintiffs and the undisputed fact that the cargo was damaged. And having considered them I am inclined to accept and I am satisfied on the balance of probabilities that the primary sources of the ingress of seawater into the cargo holds were as described by PW6 and particularly by PW7.

[49] And it follows that based on the unrebutted evidence of PW6 and PW7 in respect of their findings of cracks, severe corrosion and wastage in the cargo holds together with the photographs tendered and the presence of fresh marine cement patches, it is my finding and conclusion and I am satisfied on the balance of probabilities that the vessel was not seaworthy and not cargoworthy before and during the journey. Even if the only source was the hatch covers as contended, it would not exonerate the defendants of any blame in view of the unsealed gaps between the pontoon covers as

seen by PW7 and the use of single layer of poor quality tarpaulin sheets instead of the customary practice of three layers as covers.

[50] Further, I am in agreement with the submissions of learned counsel for the plaintiffs that assuming the assertion by the defendants was true, then based on the volume of seawater found in the cargo holds which required portable pumps to pump it out instead of the bilge pump as usually used, it was unlikely that the hatch covers were properly secured before and during the voyage. In addition, the bilge pump on board could not have been working properly in view of the need to use portable pumps. These are also indicators that that the ship was not seaworthy and cargoworthy at the material time. In this connection I would prefer the decision in *The Marion* [1984] 2 Lloyd's Rep 1 to that of *The Lady Gwendolen* [1965] 2 All ER 283.

[51] Accordingly, it is also my conclusion, on the balance of probabilities, that the defendants failed to exercise due diligence as expected of them before and during the voyage which therefore allowed the ingress of seawater into the cargo holds.

[52] In coming to my foregoing conclusions I did take into account the evidence of DW3 that after carrying out a test he found the hatch covers to be reliable and water-proof had they been properly secured before the voyage. But the result of the test was based on an assumption that the hatch covers were properly secured before the voyage. However there was the unchallenged evidence of PW7 that during his inspection he saw not only gaps between the pontoons covers which were unsealed but also torn tarpaulin sheets of poor quality. Thus, I would say that in fact the result of the test conducted by DW3 supports my conclusion.

[53] As stated earlier no admissible evidence was adduced to show that the damage to the cargo was due to perils of sea or act of God. There was the assertion of gale with the force of 8 during the voyage. But it was also based on hearsay evidence. No one on board the vessel during the voyage was called to testify. And although in exh P63, PW7 also narrated what was told to him, such piece of evidence remains hearsay and inadmissible. Hence, the defendants failed to establish such assertion in defence.

[54] I am also inclined to agree with the contention of learned counsel for the plaintiffs that seaworthiness includes not only the physical condition of the vessel but also the adequacy and efficiency of the crew, stores and equipment and the suitability of the vessel to carry the cargo. (See *The 'Makedonia'* [1962] 1 Lloyd's Rep 316).

[55] In the present case it was also not in dispute that the cargo was 'Clean on Board' yet damaged on arrival at the port of destination. Indeed I agree that there is prima facie case that the vessel was not seaworthy or cargoworthy for the voyage. And there was no admissible evidence adduced to rebut it.

[56] Learned counsel for the defendants urged me to accept the testimonies of DW3, DW4 and DW5, Mr Robert Elvey Gordon, in preference to that of PW6 and PW7. With respect I am unable to accede. As stated earlier,

basically the bulk of their testimonies were based on what were told to them by the Master and Chief Officer of the vessel who were not called as witnesses. And these are obviously hearsay. And in fact DW3 indirectly admitted that there were holes in the cargo holds. Under cross-examination he admitted that they were already cemented by 31 December 1995. This admission supports the version of PW6 on the probable reason for not being allowed to enter the cargo holds despite repeated requests on 25 December 1995.

[57] For the above reasons I find the defendants liable to answer the claim of the plaintiffs.

[58] The defendants however are also relying on the exceptions/exemptions under the Bill of Lading and/or the relevant provisions in Hague Rules/ Convention and tonnage limitation in defence.

[59] In view of my finding on the condition of the vessel before and during the voyage, my conclusion that there was a failure to exercise due diligence by the defendants and the absence of any admissible evidence in support of the assertions of peril of sea and/or act of God, it is trite law that the defendants are not entitled to rely on such exceptions/exemptions or on tonnage limitation as defences. (See *Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng'*; *Ingram and Royle Ltd v Services Maritimes du Treport Ltd*; *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co*).

[60] The defendants also referred to The Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960, ('the Regulations'), which is applicable in Sabah and Sarawak to limit their liability, in particular, under reg 11 thereof. But it is to be noted that under reg 9(1) of the Regulations the term 'Convention' relates to the 1957 Convention and 'Convention country' refers to countries so declared under the English Merchant Shipping Act 1958. Thus, any subsequent reference to the term herein, unless stated otherwise, should be understood as such.

[61] The relevant portion of that Regulations states:

> 11(1) No owner of a British, Sarawak or foreign ship shall where all or any of the following occurrences take place without his actual fault or privity, namely:
>
> (a) …
>
> (b) where any damage or loss is caused to any goods merchandise or other things whatsoever on board the ship;
>
> (c) …
>
> (d) where any loss or damage is caused to any property, other than any property mentioned in sub-paragraph (b) or any rights are infringed through the act or any person, whether on board the ship or not, in the navigation or management of the ship, or in the loading, carriage or discharge of her cargo, or in the embarkation, carriage or disembarkation of her passengers, or through any other act of any person on board the ship, be liable to damages beyond the following —

(i) …

(ii) in respect of such loss or infringement as is mentioned in sub-paragraphs (b) and (d), whether there is an addition loss or life or personal injury or not, an aggregate amount not exceeding an amount equivalent to one thousand gold francs for each ton of their ship's tonnage.

(2) For the purpose of this regulation —

(a) …

(b) …

(c) The amount of two hundred and three dollars and seven cents lawful currency of Sarawak, shall be deemed to be the amount equivalent to one thousand gold francs;

(d) The tonnage of a British or Sarawak ship, other than a sailing ship, shall be her registered or licensed tonnage with the addition or any engine room space deducted for the purpose of ascertaining that tonnage, and the tonnage of a British or Sarawak sailing ship shall be her registered or licensed tonnage;

(e) Where a ship built in any port or place in any part of the Commonwealth but not registered or licensed under the Merchant Shipping Acts or the law of any other country, or a foreign ship, has been or can be measured according to British law, her tonnage as ascertained by that measurement shall for the purpose of the section be deemed to be her tonnage;

(f) …

(g) the tonnage of any structure included in the definition of the expression 'ship' by virtue of paragraph (1) of regulation 9 shall for the purpose of this Part, be ascertained as provided in this paragraph for a foreign ship …

[62] It is the contention of learned counsel for the defendants that the above Regulations can be relied upon to limit their liability.

[63] The bases for such submissions are as follows:

(a) that the vessel was a Panama registered ship;

(b) that the Regulations also apply to foreign ships;

(c) that there is no necessity for the vessel to be registered with a Convention member country;

(d) that the alleged damage to the cargo occurred without the actual fault or privity of the defendants;

(e) that under cl (d) of reg 11 of the Regulations the term 'registered tonnage' should be read as 'net registered tonnage';

(f) that in the event of the defendants being held liable for the alleged damage to the cargo, the defendants should not be liable beyond an amount equivalent to one thousand gold francs for each ton of the vessel's tonnage;

(g) that the 1/3 rule should be used to ascertain the limitation amount on the basis of the tonnage of the vessel; and

(h) that the total amount payable should therefore be RM729,495.13 in contrast to the calculation based on the Convention on Limitation of Liability for Maritime Claims 1976 ('the 1976 Convention').

[64] In response learned counsel for the plaintiffs' contended that before the defendants could rely on the tonnage limitation, in particular reg 11 of the Regulations, the following should first be established, *inter alia*:

(i) that the damage to the cargo occurred without their fault or privity;

(ii) that the vessel was a British, Sarawak or foreign ship as understood under the Regulations; and

(iii) that the vessel belonged to a Convention-member country.

[65] It was also submitted for the plaintiffs the following arguments, *inter alia*:

(a) that it was not even shown from which country the vessel was registered;

(b) that the vessel was not a 'foreign ship' as understood under the Regulations in view of reg 9(3) thereof;

(c) that even accepting that the vessel was registered in Panama, that country was not a Convention-member country. To allow any vessel from any country regardless of its membership to the Convention would defeat the very purpose of the Convention upon which the Regulations was enacted;

(d) that the West Malaysian Merchant Shipping Ordinance 1952 is not applicable in Sabah and further it has no provision similar to that of reg9(3) of the Regulations. Hence any reference to that Ordinance is not appropriate; and

(e) that there is no evidence on the actual tonnage of the vessel as computed in accordance with the requirements of the Regulations.

[66] Having considered the opposing contentions of the parties, I am not inclined to find that the tonnage limitation under the Regulations applies in this case. In view of my earlier findings on the fault and privity issue any reliance on reg 11(1) of the Regulations would fail *in limine*. And on that ground alone that I should find this aspect of the defence to be without merit.

[67] But in the event that I am wrong in that finding, I would maintain my conclusion for the following reasons:

(1) that I am inclined to agree with the meaning to be given to the undefined term 'foreign ship' in reg 11(1) of the Regulations as suggested by learned counsel for the plaintiffs. Indeed reg 9(3) thereof being under the same Pt III as reg 11 should be taken as a defining guide in construing the intention and purport of the Regulations as a whole. Regulation 9(3) reads:

> This Part shall apply to any ship qualified to be registered as a British ship notwithstanding that it has not yet been registered and also to any Sarawak ship.

If that term is given the meaning as proposed by learned counsel for the defendants then the whole purpose of the Regulations would be defeated, one of which was to enact the provisions of the Convention thereby realizing the benefits of membership thereof.

I am also not persuaded to rely on the purported meaning of the term 'foreign ship' as may be understood in similar statutes in other jurisdictions since they do not have a provision equivalent to reg 9(3).

(2) that there was no admissible evidence adduced to indicate that the vessel was registered in Panama. No doubt there are the annotations in exh P61 and exh P63 ('the survey reports'). However, the annotations were not properly proved. There was no prior agreement between the parties that those documents were agreed and admitted wholly both in existence and contents. Without more the annotations are plainly hearsay. In fact PW6 and PW7 were not asked the source of such information. (See *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200). Thus it was not even established whether the vessel is qualified to be a 'foreign ship'.

(3) that even if the vessel was a foreign ship and registered in Panama, it was not established that it was qualified to be registered as a British ship. Of course this view is on the basis that reg 9(3) is relevant. Further, it was not disputed that Panama is not a Convention-member country.

(4) that the tonnage computation as suggested by the defendants was solely based on assumption since there was no evidence adduced of the actual tonnage of the vessel for the purpose of reg 11 to apply. Thus, with respect the submission of learned counsel for the defendants on this issue is without merit.

[68] Accordingly, it is my finding that the defendants have failed to establish on the balance of probabilities that they are entitled to rely on tonnage limitation under the Regulations as a defence against the claim of the plaintiffs.

[69] Overall therefore it is my finding and conclusion that the plaintiffs have proved on the balance of probabilities their claim against the defendants based on the causes as pleaded.

[70] On the other hand I find that the defendants have failed to raise any doubt against the claim of the plaintiffs and/or establish their defences on the balance of probabilities so as to clear them of any liability.

[71] In coming to my final conclusion on liability of the defendants I have considered the other points raised by the defendants in resisting the claim. But I am not persuaded that they are sufficient to convince me to conclude otherwise.

THE QUANTUM

[72] The defendants dispute each and every item of the quantum as pleaded by the plaintiffs.

[73] First to be disputed was on the alleged depreciation in value of the cargo. Learned counsel for the defendants submitted that the wettage to the cargo did not depreciate its value. That it was still merchantable. And it was wrong for the plaintiffs to have disposed of it at a discounted price. Learned counsel further submitted that the second test by PW1 was flawed and that

the evidence of DW6 Mr Tan Swee Keng should be accepted since it was his view that the chemical ingredients of the cargo remained unchanged although it was wet by seawater.

[74] With respect, I am unable to agree with the contention of the defendants. Whatever was the condition of the cargo, it is plain common sense that no one would pay for an item which is not in its original and normal state. If indeed the defendants believed that the cargo could have been sold at the usual price then there was no explanation given why they failed to offer the plaintiffs at the material time an alternative price for it. This is not a case of where the defendants did not know from the beginning that the cargo was damaged.

[75] In fact it was the evidence of PW5, Mr Jeffrey Lo Cheng Tak, that there were specifications to meet when selling products such as the cargo and a purchaser had the right to return them if they were not according to such specifications. In the present case it was the evidence of PW1 that the cargo had higher content of sodium chloride due to the contact with seawater.

[76] Thus there is no merit in the submission for the defendants.

[77] In respect of the claim for the expenses incurred for stevedoring and handling charges, weighment charges and rental of warehouse it was the submission for the plaintiffs that these should also be allowable since, inter alia, these were wasted expenses incurred before or after the contract and that in accepting delivery of the damaged cargo the plaintiffs in fact mitigated their losses. The cases of *Anglia Television v Reed* [1972] 1 QB 60 and *Lloyds & Scottish Finance Ltd v Modern Cars and Caravan (Kingston) Ltd* [1966] 1 QB 764 were cited in support.

[78] For the defendants it was submitted that these expenses would have been incurred in any event and they did not flow from the damage to the cargo.

[79] Having considered the opposing arguments I am inclined to accept the view that such expenses would have been incurred in any event. Hence I should not allow this head of quantum of claim. But I also accept as the correct expression of legal principle the decision in *Anglia Television* wherein if there are claims for wasted expenses and loss of profit, an election has to be made. In the present case there is also a claim for loss of profit. Thus my refusal to allow these expenses should not be to the prejudice or being considered as unjust to the plaintiffs.

[80] The plaintiffs are also claiming for the survey fees incurred. There was a need to engage surveyors after it was discovered that the cargo was damaged. The defendants disputed this claim submitting that the cargo did not lose its merchantable value. With respect, I find no merit in the contention of the defendants. The expenses were incurred due to the damage of the cargo. I am also satisfied on the balance of probabilities that the survey fees were in fact paid. I would therefore allow this head of quantum of claim.

[81] Finally the plaintiffs are also claiming for loss of profit. It was the contention of learned counsel for the plaintiffs that the loss was a direct loss arising from breach of the contract. And in respect of the clauses in the Bill of Lading, learned counsel for the plaintiffs argued that they were not applicable in the circumstances of the present case.

[82] The defendants in disputing this head of quantum of claim submitted that cll 23 and 24 of the Bill of Lading exempted them from being liable to pay for the alleged loss of profit. Further, it was argued that the claim was not reasonably foreseeable and there was no evidence adduced to show that the defendants had the prior knowledge that the cargo would be resold. The case of *The 'Arpad'* [1934] 49 Lloyd's Rep 313 was cited in support where it was held by the English Court of Appeal that circumstances peculiar to the purchase such as a sub-sale, if not communicated to the shipowner, must be excluded from consideration. (See also *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 and *Lee Heng & Co v C Melchers & Co* [1963] MLJ 47).

[83] Now, in respect of cll 23 and 24 in the Bill of Lading I do not think they are applicable in this case in view of my earlier findings that the vessel was not seaworthy and not cargoworthy. Further, I am in agreement with the contention of learned counsel for the plaintiffs on the applicability of cl 23. It deals with a situation where there is a settlement. As for cl 24 it is related to indirect loss whereas in this case it is a claim for loss of profit directly due to the damage on the cargo arising from breach of the contract. Hence, it is also not applicable in the instant case.

[84] As regards the submissions that the loss must be reasonably foreseeable and that the defendants should have prior knowledge on the resale of the cargo before they could be held liable for the loss of profit, s 74 of the Contracts Act 1950 is relevant. And in this case it is my view that only the first limb of the compensatory rules applies. (See *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39). If a loss is the natural consequence of a breach of contract then the requirement of prior knowledge is not crucial. And in this case I am satisfied on the balance of probabilities that the plaintiffs have succeeded in proving that the loss of profit is the natural consequence of the breach of the contract by the defendants. The plaintiffs have shown through PW5 that they are suppliers of fertilizer and the cargo would have been resold as was done for the previous imports. There was also no challenge to the list of potential buyers of the cargo as given by PW5 had it not been damaged.

[85] Accordingly I do not find any merit in the submission by the defendants in respect of the claim for loss of profit.

CONCLUSION

[86] For the above reasons it is my finding and it is my judgment that the plaintiffs have proved their case on the balance of probabilities and I find the defendants liable for their claim.

[87] Accordingly judgment is therefore entered for the plaintiffs in terms as follows:

(a) Loss of value of the cargo less the proceeds from the tendered sale, that is, US$700,000 or its equivalent in Ringgit Malaysia on the date of judgment less the sum of RM121,400;

(b) Loss of profit — RM192,500;

(c) Survey Fees — RM3,130;

(d) Interest on the judgment sums at the rate of 6%pa pursuant to s 11 of the Civil Law Act 1956 from the date of writ of summons in rem to the date of judgment;

(e) Statutory interest on the judgment sums at the rate of 8%pa from the date of judgment to the date of actual full payment; and

(f) Costs to the plaintiffs to be taxed.

Plaintiffs' claim allowed.

Reported by Lim Lee Na